Supreme Court, U.S.
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No. 91-7358

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1991

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TODD A. BRECHT
Petitioner,

v.

GORDON A. ABRAHAMSON, Superintendent
Respondent.

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On Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

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# BRIEF OF THE COUNTY OF WAYNE, MICHIGAN AS AMICUS CURIAE SUPPORTING RESPONDENT

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## STATEMENT OF THE QUESTION

SHOULD VIOLATIONS OF "PROPHYLACTIC" RULES BE CONSIDERED DIFFERENTLY THAN VIOLATIONS OF THE ACTUAL CONSTITUTION, AND ARE THERE ARTICLE III CONCERNS WITH FEDERAL ENFORCEMENT OF PROPHYLACTIC RULES IN STATE CASES ABSENT ANY FINDING OF CONSTITUTIONAL ERROR?

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## INTEREST OF THE AMICUS

Amicus is the County of Wayne. The Wayne County Prosecutor's Office represents the State of Michigan in many habeas corpus petitions arising out of criminal cases prosecuted in Wayne County, and thus many valuable resources are spent on these matters. Amicus is also counsel for the Warden in the pending case of Withrow v Williams, involving an issue closely related to that raised in this case; namely, whether the principles of Stone v Powell should be applied to Miranda claims raised on habeas corpus. The outcome of the litigation in this case is thus of great interest and importance to the County of Wayne.

"Today's extension...is the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restrictions upon law enforcement....(these layers designed) to protect the right against compelled self-incrimination, found (at last!) in the Constitution."

Dissent of Justice Scalia, Minnick v Mississippi, 112 L Ed 2d 489, 506 (1990)

"Doyle is therefore a prophylactic rule designed to protect another prophylactic rule from erosion or misuse."

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"We deal with such a penumbral doctrine--one that until Brown would not have been open at all on collateral review."

Brecht v Abrahamson, 944 F 2d 1363, 1370, 1373 (CA 7, 1991)

## I. Introduction

This Court has granted certiorari on the question of whether the standard of review on federal habeas corpus as to errors involving a violation of a prophylactic rule should be whether the error was harmless beyond a reasonable doubt, the standard for constitutional error, or whether the error



had a substantial and injurious effect or influence on the jury's verdict, the standard followed by the Seventh Circuit in this case. This Court also has pending before it a case on certiorari granted in which the issue is whether Miranda claims should be cognizable on federal habeas corpus at all. Withrow v Williams, No. 91-1030. A claim of Miranda error which is unaccompanied by a claim or finding of involuntariness is a claim of a violation of a prophylactic rule, rather than of the Constitution itself. The Seventh Circuit in this case has held that the rule of Doyle v Ohio is a prophylactic rule designed to protect the Miranda prophylactic rule from misuse. If this Court were to hold in Withrow v Williams that Stone v Powell, 428 US 465, 96 S Ct 3037, 49 L Ed 2d 1067 (1976) should be extended to Miranda claims because of their prophylactic nature, that holding might well mean that the

underlying Doyle claim in the instant case should not have been reviewed at all on habeas corpus. But beyond this, it is a fact that in neither Withrow v Williams nor the present case is a claim that the Constitution was violated before the Court. Amicus submits that there is thus a critical underlying point at issue in these cases, which the Court ought also to consider, as it goes to the very jurisdiction of this Court, and of the lower federal courts as well; that is, whether a federal court has jurisdiction under Article III (and the federal habeas corpus statute) to consider claims which, if sustained, do not amount to a finding of a violation of the Constitution or any federal statute?

## II. Prophylactic Rules and The Law of Presumptions

What is a prophylactic rule but a rule which is designed to protect against the violation of some other principle, and in



constitutional cases, a constitutional principle? Clearly, with prophylactic rules it is possible to violate the rule without violating the Constitution itself (else the rule would not be a prophylactic rule, but the very Constitutional principle itself). Prophylactic rules, then, create presumptions about that which is to follow from a finding of their violation; but where the presumption is considered irrebuttable it becomes a rule of law, and violates Article III of the Constitution.

The law of evidentiary presumptions is itself a morass, but there are two sorts of presumptions which are generally recognized: permissive presumptions, and "mandatory" presumptions. With a "permissive" presumption the fact-finder is instructed that it "may," but need not, infer the fact to be presumed from the facts underlying the presumption should those facts be proven by the requisite standard. With a "mandatory"

presumption the fact-finder is instructed that it must find the presumed fact proven if it finds the facts underlying the presumption proven by the requisite standard. Put another way, the fact-finder is in effect told that the underlying facts are a definition of the presumed fact, so that a finding of the underlying facts is a finding of the presumed fact. When a mandatory presumption is also irrebuttable because it operates as a definition it is simply a rule of law, then, another way of saying the same thing: for example, A plus B equals C.

It is the accepted wisdom that in criminal cases only permissive presumptions are constitutional. While amicus believes this doctrine to be mistaken, amicus also believes there is yet a third sort of presumption, a conditionally mandatory (rebuttable) presumption; that is, a fact which must be found if the foundation facts



are proven by the requisite standard, unless the opposing party comes forward with evidence contradicting the presumed fact. Prophylactic rules to protect constitutional rights, as created and applied by this Court, operate, as against the Government, as mandatory presumptions on some occasions, and as conditionally mandatory presumptions on others. With regard to the Government's case the prophylactic rule operates as an irrebuttable mandatory presumption; with regard to impeachment, for example, it operates as a conditionally mandatory presumption.

The Miranda rules provide an excellent illustration of this point. With regard to use by the Government of a statement taken in violation of Miranda (or other prophylaxis spun out of Miranda, such as Edwards v Arizona, 451 US 477, 101 S Ct 1880, 68 L Ed 2d 378 (1981) and Arizona v Roberson, 100 L Ed 2d 704 (1988)), a

statement taken in violation of the prophylactic rule is mandatorily and irrebuttably inadmissible. Since the Constitution itself proscribes only involuntary statements, and since the federal courts have constitutional authority only over federal claims, the rule must of necessity be that a violation of Miranda equals a violation of the Constitution; that is, a Miranda violative statement is involuntary. No amount of evidence of voluntariness in fact put forward by the Government can make any difference--indeed, it is irrelevant. But with regard to impeachment, this is not so. The mandatory presumption of involuntariness from the violation of the prophylactic rule is rebuttable, and if the Government can prove voluntariness in fact, then the statement may be used to impeach.

Obviously, this approach is inherently



contradictory. It cannot make "constitutional sense" to define a statement as involuntary because Miranda violative when the statement is to be used to prove guilt, but to define the same statement as voluntary when used to impeach. The truth is, as the Court has repeatedly said, that the impeachment cases are correct. A Miranda violative statement is not of necessity involuntary, and involuntariness cannot be defined by the Miranda prophylaxis. To so define it is to amend the Constitution, to create an Amendment 5a. This is true of all prophylactic rules the violation of which is not necessarily a violation of the Constitution--to mandate a remedy of exclusion without a finding of constitutional error is beyond the Article III authority of federal courts, and such claims should thus not be cognizable on federal habeas corpus at all.

III. Article III and Irrebuttable Prophylactic Presumptions

Again, the Article III difficulty with federal enforcement of prophylactic rules, absent a finding of a violation of the Constitution, is made plain by reference to the Fifth Amendment. The Fifth Amendment to the Federal Constitution provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself." In Miranda the Court established that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination", and further established the mechanism, the warnings, necessary to "safeguard" the Fifth Amendment right. A defendant may "waive" these rights delineated in the warnings (to remain



silent, to have counsel, either retained or appointed, to cutoff questioning at any time), but the waiver must be "voluntary, knowing, and intelligent."

However, this Court has on more than one occasion recognized that these procedural safeguards, these warnings, "...(are) not themselves rights protected by the Constitution." Michigan v Tucker, 417 US 433, 94 S Ct 2357, 41 L Ed 2d 182 (1974). Indeed, in Harris v New York, 401 US 222, 91 S Ct 643, 28 L Ed 2d 1 (1971) (1971) this Court explicitly recognized that it is possible for a Miranda-defective confession nonetheless to be voluntary; that is, not compelled. In these circumstances, held the Court, the voluntary confession may be used for impeachment purposes, though not for substantive evidence in the case-in-chief in order to prove guilt. Thus, it logically

follows, and no doubt has occurred, that a confession may be excluded as proof of guilt in a circumstance where it was not compelled, but rather a court has ruled explicitly that it was voluntarily given. The confession is excluded as proof of guilt because of the violation of a right not itself "protected by the Constitution" though the very right protected by the Constitution, the right not to be compelled to be a witness against oneself, has not been violated. Once the Court recognized that not every Miranda defective confession is involuntary, it in essence recognized that Miranda was wrongly decided, for it implicitly recognized that Miranda had required States to exclude confessions from evidence though they were not obtained in violation of the Constitution, a holding beyond the authority of any federal court. This is true of all prophylactic rules where there is no finding that the Constitution



itself was violated.

Once the Court recognized that not every Miranda-defective confession can be said to have been gained in violation of the Fifth Amendment (that is, coerced), it admitted that it had gone beyond its Article III power in Miranda, for if it is true in a particular case that a confession is voluntary though Miranda-defective, so as to be admissible for impeachment under the rule of Harris v New York, from whence comes the constitutional authority of any federal court to order a state court to exclude from evidence a confession gained in violation of no constitutional right (it being remembered that the Miranda rights are not themselves "rights protected by the Constitution")? Certainly not from Article III of the Constitution, giving all Judicial Power "in Law and Equity, arising under this Constitution, the Laws of the United

States...." to the federal courts (emphasis added).

Professor Grano has persuasively demonstrated the jurisdictional difficulty with federal judicial remedies in State cases where there has been found no violation of the Constitution, but only of a prophylactic rule designed to protect a Constitutional right, it being possible to violate the prophylactic rule without violating the Constitution. See "Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy", 80 Northwestern L Rev 100 (1985). The Miranda rules are plainly "prophylactic" rules, and have been referred to in this manner by the Court itself. They are prophylactic because their purpose is to "safeguard" the Fifth Amendment right against compulsory self-incrimination, and thus, can be violated without violating the Constitution



itself. Under Article III, prophylactic rules, as applied to the states, may only be legitimate if they reflect something other than an exercise of general supervisory authority over state courts by the Supreme Court, because the Supreme Court has no such power. As Professor Grano explains in detail, the only tenable argument in support of exclusion of evidence in state criminal cases for the violation of a prophylactic rule is if the rule has been created out of an implied Article III authority to make procedural rulings in order to aid the Supreme Court (and other federal courts) in determining whether a violation of the Constitution itself has occurred. In short, the rules are permissible if established as a rational method--an evidentiary rule--for assessing claimed violations of the constitution. A prophylactic rule as a "conditionally mandatory" or rebuttable presumption would comport with Article III--it would provide that a showing of

certain facts (e.g. inadequate Miranda warnings) raise a presumption that a particular constitutional right has been violated, which the State can overcome with evidence on the question. But application of an exclusionary remedy for violation solely of a prophylactic rule, any evidence the State wishes to offer that the constitutional principle at stake has not itself been violated being irrelevant to the question of admission of evidence in the State's case, is to substitute the prophylactic rule for the Constitution itself.

IV. Conclusion

Conclusive presumptions flowing from prophylactic rules are substantive rules of law, and are in effect Court initiated amendments to the Constitution. Consideration of claims of violation of prophylactic rules, or prophylactic rules



designed to protect prophylactic rules, as in the instant case, or the standard of review for harmless error when a prophylactic rule (or prophylactic rule designed to protect a prophylactic rule) is violated, is simply beyond the authority of federal courts under Article III, and beyond the statutory authority of the habeas corpus statute as well (which grants jurisdiction only to inquiry "on the ground that (the petitioner) is in custody in violation of the Constitution or laws or treaties of the United States." 28 USC 2254(a)).

This Court should hold that because violation of prophylactic rules without any attendant finding of a violation of the protected constitutional principle raises no federal issue, petitions for habeas corpus raising only claims of a violation of a prophylactic rule are not cognizable, and that the question of the standard of

harmless error for violation of a prophylactic rule raises no federal question, the federal courts being without constitutional authority to order any exclusionary remedy at trial for violation of only a prophylactic rule, or to consider the consequences of the admission of evidence which was admitted in violation of only a prophylactic rule.



## CONCLUSION

WHEREFORE, amicus respectfully requests that the judgment of the circuit court of appeals be affirmed.

Respectfully submitted,

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